U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: OCT 21 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The AAO dismissed the petitioner's appeal from that decision. The matter is now before the AAO on a motion to reconsider. The AAO will dismiss the motion.

The petitioner filed the Form I-140 petition on February 17, 2012, seeking classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a high school science and math teacher in The petitioner has taught at since 2007. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director denied the petition on October 27, 2012, having found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States. The petitioner appealed the denial, and the AAO dismissed the appeal on March 8, 2013.

On motion, counsel asserts that the AAO relied too heavily on a precedent decision without giving due consideration to other elements of federal policy. Counsel also claims that the AAO failed to give due consideration to counsel's prior assertions.

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The statute and regulations contain no specific guidance with respect to the national interest waiver, except for provisions regarding certain physicians that do not apply to this proceeding.[1] *In re New York State Dept of Transportation*, 22 I&N Dec. 215, 217-18 (Act. Assoc. Comm'r 1998) (*NYSDOT*), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, a petitioner must establish that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, a petitioner must establish that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

In dismissing the petitioner's appeal, the AAO did not dispute the intrinsic merit of the petitioner's occupation, but found that the petitioner had not shown that her work would provide a benefit that is national in scope, or that she will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications. On motion, counsel takes issue with four elements of the AAO's appellate decision.

The first disputed element of the AAO's appellate decision concerns the Department of Labor's debarment of the petitioner's employer, In its decision, the AAO noted that the petitioner had raised the issue of s debarment under section 212(n)(2)(C)(i) of the Act, which prohibits the approval of any employment-based immigrant or nonimmigrant petitions filed by between March 16, 2012 and March 15, 2014. The AAO stated: "The inapplicability or unavailability of a labor certification cannot be viewed as sufficient cause for a national interest waiver; the petitioner still must demonstrate that the alien will serve the national interest to a substantially greater degree than do others in the same field. *NYSDOT*, 22 I&N Dec. at 218 n.5."

On motion, counsel states: "the petitioner's National Interest Waiver is premised on our good faith arguments of her eligibility and . . . our mention of debarment was not invoked as an argument of her eligibility but merely as a point of equity."

Counsel states that the AAO appears to have held the petitioner to a standard "that is not clearly defined and quite synonymous to the threshold in an 'EB-1 Extraordinary Ability' petitions [*sic*]." Counsel does not elaborate. Section 203(b)(1)(A)(i) of the Act refers to individuals of "extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim." The regulation at 8 C.F.R. § 204.5(h)(3)(ii) indicates that a petitioner can establish extraordinary ability by meeting at least three of ten specified evidentiary criteria, including "nationally or internationally recognized prizes or awards for excellence in the field of endeavor" and "evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation." Counsel does not explain how the AAO held the petitioner to an "extraordinary ability" standard.

[1] *See* section 203(b)(2)(B)(ii) of the Act and 8 C.F.R. § 204.12.

The petitioner's failure to meet the eligibility standards for the waiver does not establish or imply that those standards are impermissibly high.

The second point that counsel disputes on motion concerns the following quoted passage from the AAO's appellate decision:

> Any change that took place after the petition's filing date cannot retroactively establish eligibility. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request. 8 C.F.R. § 103.2(b)(1). USCIS cannot properly approve the petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

The AAO had noted that the petitioner obtained certification in a third subject area after the petition's filing date. Counsel, on motion, does not contest the cited precedent, but maintains that the petitioner was already eligible at the time of filing.

The third point that counsel raises on motion concerns the assertion that USCIS should grant the waiver based on the No Child Left Behind Act (NCLBA), Pub.L. 107-110, 115 Stat. 1425 (Jan. 8, 2002). In its appellate decision, the AAO stated: "The assertion that the NCLBA is tantamount to a retraction or modification of *NYSDOT* is not persuasive; the NCLBA did not amend section 203(b)(2) of the Act."

On motion, counsel states: "it is not the petitioner's claim that NCLBA is tantamount to a retraction or modification of NYSDOT. However, it is our position that the pertinent needs of NCLBA as submitted in her Case File be considered more particularly in defining what is 'in the national interest' instead of departing from oblivion." Counsel also states: "there is no standing definition provided to what is 'in the national interest' in NYSDOT." Counsel states:

> With NCLBA in place, petitioner has legitimately beseeched the USCIS to put in consideration pertinent provisions of the Act in the adjudication process instead of completely ignoring same and zeroing solely on NYSDOT. As explicitly admitted in NYSDOT, "neither the statute nor USCIS regulations define the term "national interest".["] Additionally Congress did not provide a special definition of "in the national interest."
>
> Whereas, NCLBA provided a definite definition of "in the national interest" as elaborated in the petitioner's Case File, the NYSDOT has not even gone closer to this. In fact, nowhere in the USCIS' decision could be found its proposed definition of what is "in the national interest" in the field of education.

Having asserted that *NYSDOT* does not define "the national interest," counsel does not identify any section of the NCLBA that contains a "definition of what is 'in the national interest' in the field of education." The NCLBA does not, as counsel claims, "provide[] a definite definition of 'in the national interest.'"

The NCLBA prescribes certain measures intended to improve public education, but it does not state or imply that one of those measures involves granting national interest waivers to public school teachers. The NCLBA did not create any new immigration provisions or modify any existing ones. The statute contains several references to "immigrant children and youth" (in the context of their particular needs), but no references to immigrant teachers.

Counsel asserts:

> Although not an immigration [statute] per se, NCLBA's implementation resulted [in] hiring of foreign teachers which were given immigration benefits by USCIS through the H-1B Program or J-1 Program, among others. For this reason, it would be a prudent exercise of the Attorney General's discretion for USCIS to also squarely adjudicate these foreign teachers' NIW Petitions on the merits based on the same NCLBA law that accorded them those temporary worker status.

The statutory provisions relating to H-1B and J-1 nonimmigrant workers existed prior to the NCLBA, and the NCLBA did not amend those provisions. Counsel appears to suggest that the NCLBA indirectly accorded such workers nonimmigrant status, by imposing conditions that led to increased hiring of foreign teachers, but counsel does not provide or cite any evidence in support of this claim. The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, prior nonimmigrant status is not a basis for granting the national interest waiver.

The fourth and final contested assertion in the AAO's appellate decision reads as follows:

> Counsel fails to explain how the actions of one mathematics teacher would contribute significantly to nationwide social reform and economic recovery (except to speculate that one of her students may eventually become "a national figure such as a President, a legislator, a member of the judiciary, a scientist, among others").

Counsel states that the petitioner had previously established that "her profession as a mathematics teacher would contribute significantly to nationwide social reform and economic recovery." The petitioner had submitted evidence about the importance of education, and the collective impact of the nation's teachers, but the binding precedent decision *NYSDOT* differentiates between the collective importance of a given profession and the individual impact of one worker in that field. *NYSDOT* states: "While education is in the national interest, the impact of a single schoolteacher in one elementary school would not be in the national interest for purposes of waiving the job offer requirement of section 203(b)(2)(B) of the Act." *Id.* at 217 n.3. The AAO asserted that "the same logic applies to teachers at other levels." Counsel does not show that the petitioner's individual efforts have resulted in the kind of impact contemplated by *NYSDOT*.

After addressing the specified points discussed above, counsel repeats assertions from the appellate brief that, counsel states, the AAO failed to rebut. In the first such assertion, counsel claims that the labor certification process presents a "dilemma" because "The United States Department of Labor minimum education requirement Report for High School Teacher is just a bachelor's degree." Counsel asserts that the petitioner's academic qualifications, experience, and compensation history all exceed the minimum requirements, and therefore the labor certification process cannot accommodate these superior qualifications. Counsel states:

> [T]he employer is required by No Child Left Behind (NCLB) Law and other pronouncements . . . to employ highly qualified teachers. . . .
>
> Doing a labor certification process for the beneficiary . . . requir[ing] only a bachelor's degree, would not meet the objective of employers to hire highly qualified teachers pursuant to No Child Left Behind (NCLB) Law. . . .
>
> Going through the tedious process of labor certificat[ion] will delay if not completely frustrate the employment of 'Highly Qualified Teachers' presently working in the United States of America if labor certificate[ion] is denied.

Section 9101(23) of the NCLBA defines the term "highly qualified teacher." Briefly, by the statutory definition, a "highly qualified" school teacher:

- has obtained full State certification as a teacher or passed the State teacher licensing examination, and holds a license to teach in such State;
- holds at least a bachelor's degree; and
- demonstrates competence in the academic subjects he or she teaches.

Section 9101(23)(A)(ii) of the NCLBA further indicates that a teacher is not "Highly Qualified" if he or she has "had certification or licensure requirements waived on an emergency, temporary, or provisional basis." Counsel does not explain how the above requirements are incompatible with the existing labor certification process. The minimum degree requirement, which counsel has emphasized, is the same for labor certification as it is for a highly qualified teacher (*i.e.*, a bachelor's degree).

Counsel states that the labor certification process cannot take into account "unquantifiable factors that zero in on 'passion.'" Counsel asserts that the petitioner's employer has already found the petitioner to be well qualified for the position, and it would serve no useful purpose to repeat the job search that has already resulted in the petitioner's employment. Counsel does not explain why this consideration is a national interest issue. Counsel, in effect, puts forward the general proposition that every nonimmigrant already employed in the United States should be exempt from labor certification, because every such nonimmigrant has already passed through an employer's job selection process. The job offer requirement is not exclusive to foreign workers outside the United States, and there is no statute, regulation or case law providing such an exemption.

Counsel asserts that granting the waiver would benefit the "American Teacher Work Force" in the long run, because the petitioner's efforts will improve her school's performance, thereby qualifying the school for federal funding that will pay the salaries of other teachers. This assertion rests on the assumption that the petitioner has had more success than other teachers in meeting the various benchmarks that ensure continued funding. The petitioner has submitted no evidence in this regard.

Counsel states: "we wish to include a Study that Teach for America ('TFA') Rarely Had Positive Impact." This assertion appears for the first time on motion. A motion to reconsider cannot be used to raise a legal argument that could have been raised earlier in the proceedings. Rather, the "additional legal arguments" that may be raised in a motion to reconsider should flow from new law or a *de novo* legal determination reached in its decision that may not have been addressed by the party. A motion to reconsider is not a process by which a party may submit, for example, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior decision. Instead, the moving party must specify the factual and legal issues raised on appeal that were decided in error or overlooked in the initial decision or must show how a change in law materially affects the prior decision. *See Matter of Medrano*, 20 I&N Dec. 216, 219 (BIA 1990, 1991).

Even then, neither the director nor the AAO had claimed that the TFA program had any bearing on the outcome of the petition. Citing a 2010 Department of Education report, *ESEA Blueprint for Reform*, counsel states:

> The U.S. Department of Education's finding that meeting the NCLB Act's requirements for the "highly qualified" standard "does not predict or ensure that a teacher will be successful at increasing student learning" because while the NCLB requirements set minimum standards for entry into teaching of core academic subjects, they have not driven strong improvements in what matters most: the effectiveness of teachers in raising student achievement which demonstrates that teacher effectiveness contributes more to improving student academic outcomes than any other school characteristic.

The finding that "the NCLB requirements . . . have not driven strong improvements in . . . the effectiveness of teachers in raising student achievement" appears to undermine the cornerstone of the waiver claim, which is that the NCLBA has set the standard for the national interest with respect to education.

The petitioner, on motion, has not established that the AAO's decision was based on an incorrect application of law or USCIS policy, or that the decision was incorrect based on the evidence of record at the time of the initial decision. Therefore, the AAO will dismiss the motion. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the petitioner has not met that burden.

ORDER: The motion is dismissed.